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*ADMITTED IN DC ONLY

212-701-3406

May 19, 2015

Re: *HLP Properties, LLC, et al. v. Consolidated Edison Company of
New York, Inc.* Docket No. 14-CV-1383(LGS)

Dear Judge Schofield:

I will let Mr. Mastro's letter of last night pass without substantive comment on the theory that you will recognize it for what it is (and isn't), but one thing that Mr. Mastro did requires brief explication. Mr. Mastro devoted half a dozen lines in footnote 6 to complaining about an email from my colleague Peter Garam of Con Edison to me which was inadvertently sent to others as well and thereafter recalled by Mr. Garam. In an attempt to falsely create an aura of mystery and nefariousness about this entirely benign episode, Mr. Mastro piously refrained from quoting Mr. Garam's email, although he admitted that I had told his colleague Ms. Rearden several hours earlier that Con Edison asserted no privilege over this email.

The complete facts are these.

After I sent Mr. Mastro a lengthy, comprehensive and entirely substantive meet and confer email at 4:59 PM on May 15, Mr. Mastro responded with a non-substantive email on May 16 at 12:50 PM. Mr. Garam, who was in California for the weekend visiting with his grandchildren, sent an email (copy enclosed) from his iPhone (not his desktop machine) which read in its entirety "looks like we didn't quite get there. We need to step up our game. Bold and caps the next time." – obviously directed to me as a sarcastic expression of his frustration about the fact that, no matter how often we write to Mr. Mastro to meet and confer about a subject, he invariably responds by telling Your Honor that we have failed to meet and confer with him. Because he was in California, because he was with his grandchildren, because he was on his iPhone, or simply because he was jetlagged and not paying enough attention, Mr. Garam committed a fatal emailing sin – instead of hitting "forward," he hit "reply to all," thus sending this email not only to me (its intended recipient) but also to Mr. Mastro and several of his colleagues who had been copied on the preceding email.

When Mr. Garam realized his mistake about a half hour later, at 2:04 PM he sent an email (copy enclosed) to all of the recipients of his 1:28 PM email saying in its entirety "I recall this

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message.” In doing so, Mr. Garam was utilizing the terminology of the world of emails – a person who has erroneously sent an email “recalls” that email. This is a standard convention, as is surely well known to everyone who received a copy of Mr. Garam’s email. Of course, with a twinkle in his grandfatherly eye, Mr. Garam was having a little more fun – he was slyly mocking the “recall notice” recently sent by Plaintiffs.

Either because he lacks a sense of humor or because he was looking for a molehill to escalate into a mountain, Mr. Mastro responded on Sunday, May 17 at 6:16 PM to “request that we schedule a ‘meet-and-confer’ call over the purported basis for Peter’s attempt to recall his email below, which constitutes an admission on Con Edison’s part and does not appear to us to be conveying any actual advice of counsel protected by any privilege. But we want to afford you the opportunity to explain the purported basis for the recall, and we will then consider your position before taking any further action in this regard.” I responded to Mr. Mastro by saying “glad to see you have time for jokes.” Mr. Mastro responded to me by saying “when would you like to have the call on my ‘meet-and-confer’ request?” When I did not accept this gambit, he wrote to me again saying “so am I correct that you are once again refusing to ‘meet-and-confer’?” He followed this up with another email in which he said “your emails deriding me for requesting a ‘meet-and-confer’ on Con Edison’s attempt to recall this shocking email [sic] and then following up with more ad hominem attacks will be part of any record I may put before the Court on this issue.” Finally, to put an end to this nonsense, I wrote to Mr. Mastro on Monday morning at 10:54 AM, saying “because your conduct to date reflects a serious lapse of judgment on your part that suggests you might actually involve the Court in your little joke, I have decided to pretend that your request to meet and confer about Peter’s recall email is a serious one and not the lame attempt at humor that it obviously represents (as well an attempt to distract from the fact that you have yet to respond substantively to either of the two meet and confer emails that I have sent to you since Friday afternoon). If you want to meet and confer telephonically about Peter’s recall email (presumably before seeking some sort of unspecified judicial relief) I am at my desk now...”.

That resulted in a telephonic meet and confer between counsel last evening at 5 PM. After we discussed Defendant’s two pending substantive meet and confer emails to Plaintiffs (who basically gave them the back of the hand and encouraged us to take up our dispute with the Court), I asked Jennifer Rearden, Plaintiffs’ lead counsel on the call (who had told me Mr. Mastro was “tied up” and thus couldn’t join us) whether she had anything else she wanted to raise. She asked me if I would tell her what the basis was for Con Edison’s assertion of privilege over Peter Garam’s email. I said that Con Edison has never asserted any privilege whatsoever over the Garam email. She asked me then in that case, on what basis did Peter say that he “recalled” his earlier email. I said “because he sent it by mistake.” There was a long silence and then she said “oh.” I said that if Plaintiffs want to raise this before the Court, they should feel free to do so and wished her a nice day.

Several hours later, Mr. Mastro’s letter appeared on my screen.

Respectfully submitted,
/s/ Thomas J. Kavalier
Thomas J. Kavalier

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The Honorable Lorna G. Schofield
United States District Judge
Southern District of New York
500 Pearl Street
New York, New York 10007

VIA ECF

cc: Counsel of record

[Attachments]

From: Garam, Peter - Law <GaramP@coned.com>
Sent: Saturday, May 16, 2015 1:28 PM
To: Mastro, Randy M.
Cc: Kavalier, Thomas J.; Rearden, Jennifer H.; SPR:Gracer, Jeff; Jaffe, Carolyn - Law; Owen, David; Somekh, Sogol
Subject: Re: MEET AND CONFER <External Sender>

Looks like we didn't quite get there. We need to step up our game. Bold and caps the next time.

Sent from my iPhone

From: Garam, Peter - Law <GaramP@coned.com>
Sent: Saturday, May 16, 2015 2:04 PM
To: Mastro, Randy M.
Cc: Kavalier, Thomas J.; Rearden, Jennifer H.; SPR:Gracer, Jeff; Jaffe, Carolyn - Law; Owen, David; Somekh, Sogol; Garam, Peter - Law
Subject: Re: MEET AND CONFER <External Sender>

I recall this message

Sent from my iPhone

On May 16, 2015, at 10:28 AM, Garam, Peter - Law <GaramP@coned.com<mailto:GaramP@coned.com>> wrote:

Looks like we didn't quite get there. We need to step up our game. Bold and caps the next time.

Sent from my iPhone